SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-727

ROY GENE LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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ROY GENE LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 15, 1973.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported and is printed in full as an Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1973. A timely Petition for Rehearing En Banc was filed by Petitioner but was denied by the Court of Appeals on October 3, 1973. The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

Question Presented.

In a perjury prosecution what standard of proof should be applied to determine whether sufficient circumstantial evidence has been offered to corroborate the testimony of a single witness, who has sworn to the falsity of the alleged perjurious statement?

Statute Involved.

18 U.S.C. §1621 provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Statement.

Petitioner Roy Gene Lewis was indicted on three counts of perjury in violation of 18 U.S.C. §1621, in that he allegedly falsely testified before a federal grand jury on July 31, 1970. Upon conclusion of a bench trial, the Honorable William P. Gray acquitted petitioner on Counts One and Two but found him guilty on Count Three. Lewis was sentenced to a two-year prison

term, with six months to be served and the balance suspended. In addition, he was placed on probation for two years.

The subject matter of Count Three was a $200,000 loan fee paid by the Beverly Hillcrest Hotel of Beverly Hills, California in connection with a $3,500,000 loan obtained from the Central States Southeast and Southwest Areas Pension Fund. Certain preliminary facts were never in dispute either before the grand jury or at the trial. The $3,500,000 loan was consummated through the Title Insurance and Trust Company in December, 1967. Pursuant to the escrow instructions, Petitioner Lewis was paid $50,000 for services rendered in obtaining the loan. Beverly Hillcrest paid an additional $200,000 finder's fee to the Pacific American Investment Company of Hong Kong. Howard Neidich, the prosecution's principal witness and an acknowledged perjurer, caused the $200,000 to be wired to Pacific American's Hong Kong bank. The gist of Count Three was that Petitioner Lewis had "heard" or "learned" that one Leonard Bursten had returned the $200,000 or a portion thereof from Hong Kong to the United States.

In particular, Count Three charged Lewis as follows:

"COUNT THREE

[18 U.S.C. §1621]

"The Grand Jury realleges and incorporates by reference paragraphs one and two of Count One above.

Q. Now what was your understanding of the total fee that was to be paid by the Beverly Hill-

crest in return for receiving the Pension Fund loan?

A. $250,000.

Q. $250,000, sir?

A. Yes, sir.

Q. And how large a loan was it?

A. Three and a half million.

Q. And how much were you to receive of the $250,000?

A. $50,000.

Q. And what was to be done with the remaining two hundred thousand?

A. To be paid to Pacific American." [Grand Jury Transcript, p. 18, line 14, to p. 20, line 1.]

"Q. Now, have you heard from any source that this $200,000 was sent to the account of Pacific American Investment in Hong Kong?

A. Yes, I assumed it was.

Q. And have you ever heard from any source that this $200,000 or a portion thereof was returned to the United States by Mr. Bursten?

A. No, sir." [Grand Jury Transcript, p. 24, lines 13-20.]

"Q. Did Mr. Bursten ever indicate to you that he had brought any or all of that $200,000 back from Hong Kong to Los Angeles?

A. No, sir.

Q. Did you ever learn of that from any source whatsoever?

A. No, sir." [Grand Jury Transcript, p. 25, lines 17-23.]

"Any such testimony was false and contrary to the oath taken by ROY GENE LEWIS as he then well knew in that the $250,000 or a portion

thereof had been returned to the United States by Mr. Bursten.

In violation of Section 1621, Title 18, United States Code".

The prosecution's case included the testimony of witnesses Bulasky and Winters, owners of the Beverly Hillcrest Hotel; Greene, attorney for Beverly Hillcrest; and Woltag, who was the Hong Kong manager of Pacific American Investment Company. The dominant reason for their testimony was to establish (1) that Petitioner Lewis knew that the subject $200,000 was forwarded to Pacific American in Hong Kong and (2) that Leonard Bursten traveled to Hong Kong in January, 1968, converted $200,000 to cash and departed. None of these witnesses related any significant facts which would corroborate the perjury charge that Lewis was informed that Bursten had returned to the United States with the money.

The principal government witness was Howard Neidich, president of Interstate Excavation Co. Interstate had an earthmoving contract involving millions of dollars with Beverly Ridge Estates Corporation, whose general manager was Leonard Bursten. With respect to the specific charge in issue, Neidich testified that he and a Mr. Kenny Pinns met Leonard Bursten in Canada, and the three of them returned to Los Angeles. [Tr. 52.][1] Neidich asserted that on arrival they immediately proceeded to the Beverly Ridge offices where Bursten and Neidich met alone while Pinns remained outside. According to Neidich, Bursten produced a manila envelope from which he extracted $25,000 and gave it to Neidich allegedly as a repayment of an

[1]Citation is to the trial transcript.

Interstate Excavation Co. loan of $25,000 to Petitioner Lewis. [Tr. 58.] Neidich next claimed that Lewis was present outside the office and that he told Lewis that Bursten had paid the $25,000 Lewis owed to Interstate [Tr. 58.][2] Neidich further testified that he and Bursten met Lewis the next morning at the airport and that Bursten handed Lewis a package which Bursten stated contained the money he brought back from Hong Kong. [Tr. 59.]

On cross-examination, Neidich admitted he never saw how much money Bursten had in the manila envelope and noted that the money was never counted in his or Lewis' presence. [Tr. 104.] Neidich could not identify the package handed to Lewis at the airport as the manila envelope nor was he, or any other witness, aware of the contents of the package. [Tr. 61.] To support his defense, Lewis offered evidence that he had been engaged by Interstate Excavation to obtain contracts for the construction of garages in the Los Angeles area. [Tr. 34.] Lewis stated that he assumed that the unopened package handed to him at the airport contained building plans which he was to deliver to a building contractor.

In addition, though the government acknowledged that Neidich had committed perjury on prior occasions, it refused to call Kenny Pinns, Leonard Bursten or any other witness to testify concerning the events from the time Bursten returned from Hong Kong until the meeting with Lewis at the airport. Furthermore, though Neidich admitted on cross-examination that the Inter-

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[2]Contrary to Neidich's testimony, Lewis offered substantial evidence to establish that Interstate extended the $25,000 loan to be used for the purchase of equipment and that Lewis himself had repaid the loan. [Tr. 31, 83, 241-42.]

state books would indicate that the loan was repaid on the day after he received the $25,000 from Bursten, the prosecution again refused to produce Interstate's books. Lewis' counsel had specifically invited the government to settle this issue by producing such records and called to the trial court's attention the fact that the prosecuting attorneys had admitted possession of such accounting records. Despite such invitation the government did not produce Interstate's records nor deign to offer an explanation. [Tr. 230.]

Though he acknowledged Neidich's perjurious background, the district court judge chose to believe his testimony on Count Three. The Ninth Circuit affirmed Lewis' conviction asserting that there was sufficient evidence and that the finding of guilt was not clearly wrong. (App. 2, 3.)[3] In support of its affirmance the appellate court cited certain prosecutorial evidence, none of which, however, could support the charge that Lewis "knew" the money was returned to the United States by Bursten. What is clear is that the Ninth Circuit, as well as the district judge, relied almost exclusively on the testimony of Neidich. This is readily apparent from the Ninth Circuit's deviation from its prior standards of proof required in perjury cases and its adoption of the totally circumstantial evidence "balance of probabilities test" of *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969) to perjury cases.

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[3]Citation is to the opinion of the Court of Appeals which is attached hereto as an Appendix.

REASONS FOR GRANTING THE WRIT.

This Court should grant this petition for a writ of certiorari for two fundamental reasons: (1) there exists a clear discrepancy among the Circuit Courts of Appeal as to the standard to be applied in determining the sufficiency of evidence necessary to corroborate a single direct witness' testimony in a perjury prosecution; and (2) the Ninth Circuit has specifically disavowed this Court's directive set forth in *Weiler v. United States,* 323 U.S. 606, requiring strict standards of proof in perjury cases.

Unlike most criminal cases wherein the testimony of one witness entitled to belief is sufficient to convict, it has been the long-standing rule in perjury prosecutions "that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." *Weiler v. United States,* 323 U.S. 606, 607. Stated in an affirmative manner "the falsity of testimony in a perjury case must be proved by the testimony of two witnesses, or the testimony of one witness, plus some other corroborative evidence." *Hammer v. United States,* 271 U.S. 620, 626-27. The most obvious purpose of the rule was to avoid prosecutions resting solely upon "an oath against an oath." Justice Black in *Weiler* clearly analyzed the historical and practical need for the more restrictive burden of proof and specifically rejected the government's request to abandon the necessity of corroboration of a single witness. In so holding this Court set forth the determinative rules to weigh the sufficiency of corroboration:

> "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that

> the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy." *Weiler v. United States,* 323 U.S. 606, 610.

Since *Weiler,* the lower courts have generally accepted the proposition that perjury must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed wilful and corrupt perjury. See *e.g., Vuckson v. United States,* 354 F.2d 918, 920 (9th Cir. 1966); *Brown v. United States,* 245 F.2d 549, 556 (8th Cir. 1957). While accepting these basic tenets, however, the individual circuits have differed considerably as to their particular application and there has developed in the Ninth Circuit an outright disavowance of the rules set forth in *Weiler.*

The discrepancy in the individual circuits relates to the specific rule to be followed concerning the sufficiency of evidence necessary for corroboration. For example, the Second Circuit has asserted that the corroborative circumstantial evidence must be "of a quality to assure that a guilty verdict is solidly founded" and "must be such that, were it standing alone, it would have independent probative value." *United States v. Freedman,* 445 F.2d 1220, 1226 (2d Cir. 1971).

The Sixth Circuit has evidently expanded on this concept for it follows the rule that "when the courts speak of corroborative evidence they mean *evidence aluinde*—evidence which tends to show the perjury independently." *United States v. Thompson,* 379 F.2d 625, 627 (6th Cir. 1967). In addition to such independent character, however, the Sixth Circuit has

held that to support a perjury conviction the testimony of a single witness must be corroborated by circumstances "inconsistent with the innocence of the accused." *United States v. Erhardt,* 38 F.2d 173 (6th Cir. 1967); *United States v. Thompson,* 379 F.2d 625 (6th Cir. 1967); *Hug v. United States,* 329 F.2d 475 (6th Cir. 1964). *Cf., United States v. Rose,* 215 F.2d 617 (3d Cir. 1954).

While the Fifth Circuit apparently accepts the foregoing necessity for corroborative evidence to be *evidence aluinde* and inconsistent with the innocence of the defendant, it asserts that the corroborating evidence need not be sufficient to establish independent commission of the crime charged beyond a reasonable doubt or even by a preponderance of the evidence. *Paternostro v. United States,* 311 F.2d 298 (5th Cir. 1962). The Fifth Circuit, however, did not define what exactly would be sufficient corroborative evidence.

The Ninth Circuit has embarked on its own course in determining what corroborating evidence is necessary. In *Vuckson v. United States,* 354 F.2d 918, 920 (9th Cir. 1966) while acknowledging the necessity of "direct and positive evidence", the Ninth Circuit eliminated the need for any "live" oral testimony holding written evidence in and of itself sufficient. The court justified this result by asserting that such evidence must establish the fact without the necessity for any inference based on human experience. Accord, *United States v. Brandyberry,* 438 F.2d 226, 227 (9th Cir. 1971).

In *Whaley v. United States,* 362 F.2d 938, 939 (9th Cir. 1966) the Ninth Circuit returned to the restrictive proof necessary for perjury prosecutions and reaffirmed its rule that "while circumstantial evi-

dence may support a conviction, it must be adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt". See also, *Woxberg v. United States,* 329 F.2d 284 (9th Cir.) *cert. denied,* 379 U.S. 823 (1964); *Byrnes v. United States,* 327 F.2d 825 (9th Cir.), *cert. denied,* 377 U.S. 970 (1964).

In 1970 the Ninth Circuit again deviated from the general rule of proof in perjury cases holding that where a perjury prosecution is premised on the state of mind of the declarant—that is, he asserts he does not remember a certain event—the perjury may be proved by circumstantial evidence alone. *Gebhard v. United States,* 422 F.2d 281, 287-88 (9th Cir. 1970). The apparent problems of *Gebhard,* when the rule should apply and to what extent could circumstantial evidence be used to prove perjury, were soon raised in *United States v. Cook,* 12 CrL 2013 (9th Cir. August 23, 1972). Judge Ely's original dissent criticized the extension of the *Gebhard* rule apparent in the majority's affirmance. The *Cook* opinion was subsequently withdrawn by order of court.

In the instant case the Ninth Circuit has chosen to overrule *sub silentio* its own decision in *Whaley* as well as adopting the "balance of probabilities test" of *United States v. Nelson,* 419 F.2d 1237 (9th Cir. 1969) to perjury prosecutions in direct contravention of this Court's decision in *Weiler v. United States,* 323 U.S. 606.

> "The law of this circuit does not require that the evidence must exclude every reasonable hypothesis except guilt to sustain a conviction. The balance of probabilities test of United States v. Nelson (9th Cir. 1969) 419 F.2d 1237 applies." (App. 2, 3.)

Considering that *Nelson* was a bank robbery case prosecuted exclusively by circumstantial evidence, the clear effect of this holding is to end the unique and heretofore protective burden of proof required in perjury cases. There is no necessity for any "live" testimony nor any need for direct and positive evidence. All perjury prosecutions in the Ninth Circuit will henceforth be submitted solely on circumstantial probabilities.

Petitioner Lewis herein requests a writ of certiorari so this Court might end the practice of evidential roulette and set forth a uniform rule defining the necessary corroboration in perjury prosecutions under 18 U.S.C. §1621. As is readily apparent from a review of the facts in this case, Lewis would not have been convicted under the standards of proof existent in other federal jurisdictions. A defendant's right to a fair trial should not hinge on such circumstances especially when such a rule is contrary to existing directives of this Court.

Respectfully submitted,

E. L. FRASER,
Counsel for Petitioner.

APPENDIX.

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 73-1337 USA VS. ROY GENE LEWIS

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-15-73 Affirmed, the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews, Clerk
U.S. Court of Appeals

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Roy Gene Lewis, Appellant. No. 73-1337.

Appeal From the United States District Court for the Central District of California.

Before: LUMBARD, MERRILL, and HUFSTEDLER, Circuit Judges

Filed June 15, 1973.

The evidence was sufficient to sustain the conviction. The district court was fully aware that Neidich's testimony had to be subjected to close scrutiny because Neidich had perjured himself on other occasions and was deeply implicated in illegal conduct. Neidich's testimony was corroborated by circumstantial evidence and, in some respects, by Lewis' own testimony before the grand jury. From his testimony, we know that Lewis knew about the routing of funds through Hong Kong, that Lewis received a package from Bursten when Bursten returned from Hong Kong, and that Lewis relayed the package to Kovens in Florida. If Lewis knew that the package contained proceeds of the Hong Kong fund, he surely perjured himself before the grand jury. Lewis explained that he assumed that the package contained building plans. The district court did not believe that Lewis' conduct was consistent with the explanation, and neither do we. The district court credited Neidich's testimony that Lewis asked Bursten where the money was and that Bursten said "Here it is," and gave him the envelope. That finding is not clearly wrong.

The law of this circuit does not require that the evidence must exclude every reasonable hypothesis ex-

cept guilt to sustain a conviction. The balance of probabilities test of *United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237 applies. We cannot say that the evidence, considered as a whole, failed to meet both the *Nelson* test and the strict standards of proof required in a perjury case.

The transcript of Lewis' grand jury testimony, including the administration of the oath, was admitted by stipulation. Proof that the oath was taken was adequate. (*Vuckson v. United States* (9th Cir. 1966) 354 F.2d 918.)

The record does not sustain the contention that the Government improperly withheld evidence or presented tainted evidence.

AFFIRMED.

SUPREME COURT, U.S.
FEB 6 19
MICHAEL RODAK, JR.

No. 73-727

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROY GENE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-727

ROY GENE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court below applied the wrong standard of proof in determining the sufficiency of the evidence to support his perjury conviction.

1. Following a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of perjury, in violation of 18 U.S.C. 1621. He was sentenced to two years' imprisonment, one and a half years of which were suspended; he was placed on probation for two years. The court of appeals affirmed (Pet. App.).

On July 31, 1970, petitioner testified before a federal grand jury in the Central District of California (R.T. 174).[1] The essence of his sworn testimony, upon which the indictment was predicated and for which he was convicted, was that he did not know that any or all of a $200,000 finder's fee for a loan sent to Pacific American Investments (hereafter "Pacific American") in Hong Kong was returned to the United States by one Leonard Bursten (Grand Jury Tr. 24-25).

The trial evidence showed that Messrs. Winters and Bulasky, owners of the Beverly Hillcrest Hotel in Los Angeles, sought Bursten's help in obtaining a $3,500,000 loan from the Teamsters Pension Fund in Chicago, Illinois. Bursten informed them that a $250,000 fee would have to be paid to facilitate the loan, and that petitioner would counsel them in their dealings with the Teamsters (R.T. 155-156, 177-178). In December 1966, petitioner accompanied the hotel owners to Chicago, where they were to present their request for the loan to the trustees of the Pension Fund. Petitioner instructed them that a Mr. Cal Kovens would look after them at the trustees' meeting (R.T. 155-156, 166). Prior to the meeting, the hotel owners were told by petitioner and Bursten that they would not be asked about the finder's fee (R.T. 188). Mr. Kovens, who appeared to be in

[1] "R.T." refers to the Reporter's Transcript of the trial proceedings, copies of which are being lodged with this Court.

charge of the order of appearance before the trustees, escorted them to the meeting (R.T. 166).

Through letters in September and December 1967, the Beverly Hillcrest Hotel agreed that of the $250,000 finder's fee, $50,000 would be paid to petitioner and $200,000 would be paid to Pacific American in Hong Kong[2] (R.T. 146, 159-161, 181). Mr. Woltag, the managing director of Pacific American and Pasan, testified that he had played no role in assisting the hotel owners to get their loan (R.T. 141, 146-147).

Prior to the closing of the loan on December 20, 1967, attorneys for the Pension Fund found out about the finder's fees which were being paid by the hotel (R.T. 188-189, 198). The hotel owners were then instructed by petitioner to tell the attorneys that they were paying only a $50,000 finder's fee (R.T. 189, 200). A meeting was held on the morning of December 20, 1967, at the office of Mr. Martin Greene, counsel for the hotel owners, in which Mr. Greene, the hotel owners, and petitioner participated. Mr. Greene had become concerned about the finder's fees which were to be paid, since he had seen letters indicating three such fees—$50,000 to a Mr. Dorfman,[3]

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[2] Pacific American was a company that sold California land. Another company in Hong Kong, called "Pasan," was a holding company which acquired land for Pacific American to sell. Bursten formed the two companies and was an officer as well as a shareholder in one or both of them (R.T. 141, 148-149, 152). Petitioner was a shareholder in Pacific American (R.T. 141).

[3] Dorfman was apparently a person who was attempt-

$50,000 to petitioner, and $200,000 to an organization in Hong Kong. Petitioner assured Mr. Greene that the only finder's fee was the $50,000 to be paid to himself, and that the other two fees had to do with other proposed transactions which had fallen through (R.T. 209-216). The deal for the loan was closed later that afternoon. The next day, December 21, 1967, at petitioner's direction, Mr. Winters, one of the hotel owners, wrote two checks for $25,000 payable to petitioner and eight more checks for $25,000 payable to Pacific American (R.T. 183-184, 206-207). On December 22, 1967, Winters gave petitioner nine of the checks, holding back the tenth one, which was payable to Pacific American, until he received a release from the law firm of Covey and Covey, which had also worked on the loan application (R.T. 184). This last check was given to petitioner on January 5, 1968 (R.T. 185-186).

Howard Neidich, the government's primary witness, testified that he was in California in the summer of 1966 in connection with his responsibilities as president of Interstate Excavation Company. He was introduced to petitioner by Bursten, and he subsequently entered into two different business relationships with petitioner concerning construction work (R.T. 33-36). On December 8, 1967, Neidich, at the direction of Bursten, wrote a $25,000 check to petitioner, which petitioner told him was to be a

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ing to fund the loan through other sources which did not work out (R.T. 197).

good faith payment to Mr. Cal Kovens in relation to a loan being made by the Teamsters Pension Fund to the Beverly Hillcrest Hotel (R.T. 37-40). Petitioner and Neidich went to the bank together, and petitioner cashed the check, receiving the amount in $100 bills (R.T. 40-43).

Later in December 1967, petitioner told Neidich that the checks for the $200,000 finder's fee would be made out to Pacific American and would be wired to its account in Hong Kong through the Bank of America, and that Bursten would pick up the money there and bring it home (R.T. 47-50). Petitioner told Neidich that all or some part of the money would then be delivered to Kovens, who was instrumental in obtaining the loan from the Teamsters Pension Fund (R.T. 50-51).

On or about January 6, 1968, petitioner called Neidich and asked him to wire to Hong Kong the eight $25,000 checks made out to Pacific American (R.T. 44-46). Neidich received the checks from petitioner, took them to the Bank of America, and had them wired to the Pasan holding account in Hong Kong (R.T. 46-47). Mr. Woltag, the managing director of Pasan and Pacific American, received notice on January 6, 1968, that $200,000 had been received in their Bank of America account in Hong Kong. He was surprised and did not know why such a large amount had been remitted to the account (R.T. 142-143). Bursten then called him inquiring whether the $200,000 had been received (R.T. 144).

Bursten arrived in Hong Kong on January 7th or 8th and instructed Woltag to withdraw the money in $100 bills, which he did (R.T. 144). The $200,000 was placed in manila envelopes and put into a leather bag, which Woltag gave to Bursten. Bursten left Hong Kong that evening (R.T. 145).

On or about January 9, 1968, Neidich picked Bursten up in Vancouver, Canada, drove him to Seattle, and flew back with him on a plane to Los Angeles (R.T. 52, 54-56). Bursten and Neidich then met petitioner at the offices of the Beverly Ridge Estates, where both Neidich and Bursten had their offices (R.T. 52-53). Bursten and Neidich met privately in Neidich's office, and Bursten paid Neidich $25,000 in $100 bills, which were contained in a manila envelope. This was a repayment of the loan Neidich had made to petitioner a month earlier, with which petitioner had made a "good faith" payment to Cal Kovens (R.T. 56-58). Neidich and Bursten then went down to Bursten's office, where petitioner was waiting, and Neidich informed petitioner that Bursten had repaid petitioner's debt. The three of them then discussed the money Bursten had brought back from Hong Kong (R.T. 58). At the airport the next morning, in Neidich's presence, petitioner asked Bursten "Where is the package of money?", and Bursten handed petitioner a package, saying "Here's the money." Bursten said the package contained the money that he brought back from Hong Kong (R.T. 59).

In petitioner's grand jury testimony, he admitted

flying to Miami, Florida, on January 11, 1968, and delivering a package to Cal Kovens (Grand Jury Tr. 39-42, R.T. 239), but he denied that he knew that Bursten had brought the money back from Hong Kong.

2. Absent internal contradictions in the defendant's prior testimony (see 18 U.S.C. 1623), a conviction for perjury cannot rest solely on the testimony of a single witness. See *United States* v. *Wood*, 14 Pet. 430, 437. In addition to a single witness testifying as to the falsity of the testimony of the accused, there must be corroborative evidence substantiating that testimony. See *Weiler* v. *United States*, 323 U.S. 606, 610. Petitioner contends that the court below applied the wrong standard in determining the sufficiency of corroborative evidence in this case. This contention is without merit.

The testimony of Neidich was corroborated by the testimony of several other witnesses, and in part by petitioner's own testimony. Petitioner apparently contends that the corroborative evidence was insufficient in that it did not, standing alone, establish petitioner's guilt. There is, however, no such requirement. All that is necessary is that the corroborative evidence be independent of the single witness's testimony, *United States* v. *Freedman*, 445 F.2d 1220, 1226 (C.A. 2), and that it tends to establish the defendant's guilt, *Brightman* v. *United States*, 386 F. 2d 695 (C.A. 1).[4]

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[4] While the Sixth Circuit uses language from which a stricter standard of sufficiency for corroborating evidence

Corroborative evidence is an additional evidentiary requirement in perjury cases, but it does not alter or increase the burden of proof. Once the court has determined that the corroborative evidence substantiates the testimony of the single witness, it must then determine whether the evidence as a whole is sufficient to support the conviction; in this respect, perjury cases are no different from other criminal cases. Thus, the credibility of both the single witness and the corroborative evidence are matters for determination by the finder of fact. Accordingly, the court below was correct in applying the sufficiency-of-evidence test set out in *United States* v. *Nelson*, 419 F.2d 1237 (C.A. 9), to the evidence as a whole, and while it did not repeat the specific requirements in perjury cases with regard to corroborative evidence, it did state that the evidence met the strict standards of proof required in a perjury case (Pet. App. 3).

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could be inferred, that Circuit's requirement that the corroborative evidence be inconsistent with the innocence of the defendant is applied in substantially the same way as the standards in other circuits. Compare the facts of the instant case with *Hug* v. *United States*, 329 F. 2d 475 (C.A. 6), certiorari denied, 379 U.S. 818. It seems clear that the Sixth Circuit would have reached the same result in the instant case as the Ninth Circuit did.

Whaley v. *United States*, 362 F.2d 938 (C.A. 9), cited by petitioner, held only that if circumstantial evidence is relied on for conviction, such evidence must exclude every hypothesis except guilt. *Whaley* does not involve the question of corroboration of the testimony of a single witness.

A review of the evidence, set out above, clearly shows that the finding of the court below was correct. The testimony of Howard Neidich directly shows the falsity of petitioner's statements before the grand jury.[5] Neidich's testimony was corroborated in every respect by the independent testimony of Winters, Bulasky and Woltag, and by petitioner's own grand jury testimony; it leads to the inescapable conclusion that, as Neidich testified, petitioner received all or part of the $200,000 from Bursten, and, the next day, petitioner took the money to Florida to pay off Kovens for his help in getting the loan (see district court's findings, R.T. 279-286).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[5] While petitioner complains that the government did not call certain witnesses, notably Mr. Bursten (Pet. 6), petitioner could have called such persons; for whatever reasons, he chose not to do so.

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